

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DANIEL JOHNSON AND MARY LEE
JOHNSON,

Plaintiffs,

v.

J. RICHARD CREATURA, UNITED
STATES MAGISTRATE JUDGE,

Defendant.

No. C11-5057-FVS

ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS

THIS MATTER comes before the Court without oral argument based upon the defendant's motion to dismiss. He is represented by Kayla C. Stahman. The plaintiffs are representing themselves.

BACKGROUND

On October 1, 2009, the Internal Revenue Service ("IRS") commenced an action in the United States District Court for the Western District of Washington by filing a pleading that is entitled "Petition for Judicial Approval of Levy Upon a Principal Residence." The IRS alleged Daniel Johnson and Mary Lee Johnson ("the Johnsons") had failed to pay federal income tax. The IRS sought permission to collect the allegedly unpaid tax by means of an administrative levy upon the Johnsons' residence. The case was assigned to Magistrate Judge J. Richard Creatura. The Johnsons filed a responsive pleading that is entitled "Objection to Petition and Motion to Dismiss." On

1 November 10, 2009, Magistrate Judge Creatura held a hearing. The
2 Johnsons were present. While the parties to this action have not
3 provided a transcript of the hearing (which, of course, they are under
4 no obligation to do), there are indications in the parties' papers
5 that the Johnsons reiterated their objections at the hearing and
6 demanded a jury trial. Magistrate Judge Creatura denied the Johnsons'
7 request for a jury trial, overruled their objections, and granted the
8 IRS' petition. On November 13th, Magistrate Judge Creatura entered an
9 "Order Approving Levy." The same day, Magistrate Judge Creatura
10 received a letter from Mr. Johnson. The letter bitterly criticized
11 his rulings. The Johnsons did not appeal Magistrate Judge Creatura's
12 order. Instead, on January 20, 2011, they filed an action against him
13 pursuant to 42 U.S.C. § 1983. They seek money damages, declaratory
14 relief, and injunctive relief on the ground he deprived them of rights
15 secured by Fifth, Seventh, and Eighth Amendments to the Constitution.

16 The Court has jurisdiction over the subject matter of the action.
17 28 U.S.C. § 1331. Personal jurisdiction is a different matter.
18 Magistrate Judge Creatura denies he has been served properly under
19 Federal Rule of Civil Procedure 4. Thus, the Court may lack personal
20 jurisdiction. *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir.1986) ("A
21 federal court is without personal jurisdiction over a defendant unless
22 the defendant has been served in accordance with Fed.R.Civ.P. 4.")
23 (quoting *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir.1982)).
24 However, Magistrate Judge Creatura is not raising the issue of
25 personal jurisdiction at this time. Instead, he moves to dismiss the
26

1 Johnsons' complaint on the ground he is immune from suit for damages.
2 His motion is governed by Federal Rule of Civil Procedure 12(b)(6).
3 *See Meek v. County of Riverside*, 183 F.3d 962, 965 (9th Cir.), cert.
4 *denied sub nom. Wojcik v. Meek*, 528 U.S. 1005, 120 S.Ct. 499, 145
5 L.Ed.2d 386 (1999).

6 **RULING**

7 The Johnsons are seeking several types of relief pursuant to 42
8 U.S.C. § 1983. It is useful to begin with the text of § 1983. The
9 first sentence states in pertinent part:

10 Every person who, **under color of any statute, . . . of any**
11 **State . . .** subjects, or causes to be subjected, any citizen
12 of the United States . . . to the deprivation of any rights,
13 privileges, or immunities secured by the Constitution and
14 laws, shall be liable to the party injured in an action at
15 law, suit in equity, or other proper proceeding for redress,
16 except that in any action brought against a judicial officer
17 for an act or omission taken in such officer's judicial
capacity, injunctive relief shall not be granted unless a
declaratory decree was violated or declaratory relief was
unavailable.

18 (Emphasis added.) One of the things a person must be able to prove in
19 order to prevail under § 1983 is that "the conduct complained of was
20 committed by a person acting under color of state law[.]" *Parratt v.*
21 *Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).
22 "The traditional definition of acting under color of state law
23 requires that the defendant in a § 1983 action have exercised power
24 'possessed by virtue of state law and made possible only because the
25 wrongdoer is clothed with the authority of state law.'" *West v.*
26

1 *Atkins*, 487 U.S. 42, 54, 108 S.Ct. 2250, 2258, 101 L.Ed.2d 40 (1988)
2 (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031,
3 1043, 85 L.Ed. 1368 (1941)). For example, a state judge receives his
4 authority from state law. Thus, if a state judge deprives a person of
5 a federal right, the person may be able to sue the judge under § 1983.
6 See, e.g., *Meek*, 183 F.3d at 964 ("Donald L. Meek brought a section
7 1983 action against . . . two municipal court judges alleging that his
8 First Amendment right to campaign for public office had been violated
9 when he was constructively fired in retaliation for his seeking
10 election to a municipal court judgeship."). Unlike a state judge,
11 Magistrate Judge Creatura does not receive his authority from state
12 law. He receives his authority from federal law. 28 U.S.C. § 631 *et*
13 *seq.* It was pursuant to federal law, not state law, that he was
14 authorized to adjudicate the IRS' petition. 26 U.S.C. §
15 6334(e)(1)(A); 26 C.F.R. 301.6334-1(d)(1),(2). Section 1983 does not
16 provide a remedy for acts that are performed by a federal official
17 pursuant to federal law. *Mullis v. United States Bankruptcy Court*,
18 828 F.2d 1385, 1387 (9th Cir.1987). If the Johnsons have a remedy, it
19 is under *Bivens v. Six Unknown Named Agents of Federal Bureau of*
20 *Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In
21 that case, the "the Supreme Court 'recognized for the first time an
22 implied private action for damages against federal officers alleged to
23 have violated a citizen's constitutional rights.'" *Western Radio*
24 *Services Co. v. United States Forest Service*, 578 F.3d 1116, 1119 (9th
25 Cir.2009) (quoting *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937,
26

1 1947, 173 L.Ed.2d 868 (2009)), *cert. denied*, --- U.S. ----, 130 S.Ct.
2 2402, 176 L.Ed.2d 923 (2010). A lawsuit that is authorized by the
3 *Bivens* case is, unsurprisingly, called a "*Bivens* action." See *Hartman*
4 *v. Moore*, 547 U.S. 250, 254 n.2, 126 S.Ct. 1695, 164 L.Ed.2d 441
5 (2006). A *Bivens* action is the federal analog to an action against
6 state or local officials under § 1983. *Id.* (citation omitted). The
7 fact the Johnsons have mistakenly requested relief pursuant to § 1983
8 does not necessarily mean their lawsuit must be dismissed. If they
9 can state a claim for relief under *Bivens*, then they will be given an
10 opportunity to amend their complaint pursuant to Federal Rule of Civil
11 Procedure 15(a).¹ However, while "leave to amend a deficient
12 complaint shall be freely given when justice so requires, . . . , leave
13 may be denied if amendment of the complaint would be futile." *Gordon*
14 *v. City of Oakland*, 627 F.3d 1092, 1094 (9th Cir.2010). The initial
15 issue, then, is whether it would be futile for the Johnsons to assert
16 a *Bivens* claim against Magistrate Judge Creatura.

17
18 The Johnsons seek money damages, declaratory relief, and
19 injunctive relief. As a general rule, "a judge is immune from suit
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21 ¹Under *Bivens*, a federal official may not be sued in his
22 official capacity. *Ibrahim v. DHS*, 538 F.3d 1250, 1257 (9th
23 Cir.2008). He may be sued only in his personal capacity. See,
24 e.g., *Kreines v. United States*, 33 F.3d 1105, 1107 (9th
25 Cir.1994), *cert. denied*, 513 U.S. 1148, 115 S.Ct. 1096, 130
26 L.Ed.2d 1064 (1995). The Johnsons' complaint does not indicate
whether they are suing Magistrate Judge Creatura in his personal
capacity or in his official capacity.

1 for money damages." *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116
2 L.Ed.2d 9 (1991). Not only is the judge immune from the assessment of
3 damages, but also he is immune from a lawsuit itself. *Id.* at 11, 112
4 S.Ct. 286. The doctrine of judicial immunity exists, in part, to
5 check the passions that frequently are aroused by litigation:

6 Controversies involving not merely great pecuniary
7 interests, but the liberty and character of the parties, and
8 consequently exciting the deepest feelings, are being
9 constantly determined in [trial] courts, in which there is
10 great conflict in the evidence and great doubt as to the law
11 which should govern their decision. It is this class of
12 cases which impose upon the judge the severest labor, and
13 often create in his mind a painful sense of responsibility.
14 Yet it is precisely in this class of cases that the losing
15 party feels most keenly the decision against him, and most
16 readily accepts anything but the soundness of the decision
17 in explanation of the action of the judge. Just in
18 proportion to the strength of his convictions of the
19 correctness of his own view of the case is he apt to
20 complain of the judgment against him, and from complaints of
21 the judgment to pass to the ascription of improper motives
22 to the judge. When the controversy involves questions
23 affecting large amounts of property or relates to a matter
24 of general public concern, or touches the interests of
25 numerous parties, the disappointment occasioned by an
26 adverse decision, often finds vent in imputations of this
character, and from the imperfection of human nature this is
hardly a subject of wonder. If civil actions could be
maintained in such cases against the judge, because the
losing party should see fit to allege in his complaint that
the acts of the judge were done with partiality, or
maliciously, or corruptly, the protection essential to
judicial independence would be entirely swept away. Few
persons sufficiently irritated to institute an action
against a judge for his judicial acts would hesitate to

1 ascribe any character to the acts which would be essential
2 to the maintenance of the action.

3 *Bradley v. Fisher*, 13 Wall. 335, 348-49, 20 L.Ed. 646 (1872).

4 Allowing a disappointed and angry litigant to bring a lawsuit against
5 the judge would undermine the proper administration of justice:

6 For it is a general principle of the highest importance to
7 the proper administration of justice that a judicial
8 officer, in exercising the authority vested in him, shall be
9 free to act upon his own convictions, without apprehension
10 of personal consequences to himself. Liability to answer to
11 every one who might feel himself aggrieved by the action of
12 the judge, would be inconsistent with the possession of this
13 freedom, and would destroy that independence without which
14 no judiciary can be either respectable or useful.

15 *Id.* at 347, 20 L.Ed. 646. Consequently, the necessity of judicial
16 immunity has long been recognized in Anglo-Saxon jurisprudence. *Id.*
17 at 347-49, 20 L.Ed. 646. Nevertheless, the Supreme Court has placed
18 two significant limitations upon judicial immunity. "First, a judge
19 is not immune from liability for nonjudicial actions, *i.e.*, actions
20 not taken in the judge's judicial capacity. . . . Second, a judge is
21 not immune for actions, though judicial in nature, taken in the
22 complete absence of all jurisdiction." *Mireles*, 502 U.S. at 11, 112
23 S.Ct. 286 (citations omitted). Unless the Johnsons can demonstrate at
24 least one of the preceding exceptions may apply, then the doctrine of
25 judicial immunity bars their claim for money damages.

26 The applicability of the first exception turns upon the nature of
the acts of which the Johnsons complain. Were they "judicial" in
nature? "[W]hether an act by a judge is a 'judicial' one relate[s]

1 to the nature of the act itself, *i.e.*, whether it is a function
2 normally performed by a judge, and to the expectations of the parties,
3 *i.e.*, whether they dealt with the judge in his judicial capacity.'"
4 502 U.S. at 12, 112 S.Ct. 286 (quoting *Stump v. Sparkman*, 435 U.S.
5 349, 362, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978)). When the Johnsons
6 appeared before Magistrate Judge Creatura for a hearing on their
7 objections to the IRS' petition, they understood they were seeking
8 relief from him in his capacity as a judicial officer. During the
9 course of the hearing, he considered their objections to the petition
10 and their request for a jury trial. In the end, not only did he
11 decide their demand for a jury trial was unwarranted, but also he
12 decided their objections lacked merit and the IRS was entitled to the
13 relief it requested. Decisions like these are decisions a judge makes
14 in his judicial capacity. The Johnsons acknowledge as much. In their
15 response to Magistrate Judge Creatura's motion to dismiss, they
16 forthrightly concede, "The defendant's actions were clearly judicial
17 in nature." (Rebuttal to Motion to Dismiss at 1.) The Johnson's
18 concession confirms that which is plain. The first exception does not
19 apply.
20

21 The applicability of the second exception turns upon the
22 existence of jurisdiction. Did Magistrate Judge Creatura have
23 jurisdiction over the subject matter of the IRS' petition? In *Stump*
24 *v. Sparkman*, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 55 L.Ed.2d 331
25 (1978), the Supreme Court explained the term "jurisdiction" is
26 construed broadly in this context:

1 Because some of the most difficult and embarrassing
2 questions which a judicial officer is called upon to
3 consider and determine relate to his jurisdiction, the scope
4 of the judge's jurisdiction must be construed broadly where
5 the issue is the immunity of the judge. A judge will not be
6 deprived of immunity because the action he took was in
7 error, was done maliciously, or was in excess of his
8 authority; rather, he will be subject to liability only when
9 he has acted in the clear absence of all jurisdiction.

10 (Internal punctuation and citation omitted.) The Johnsons do not
11 argue Magistrate Judge Creatura "acted in the clear absence of all
12 jurisdiction," nor could they credibly make such an argument.
13 Congress has authorized magistrate judges to review and, when
14 appropriate, grant petitions such as the one the IRS filed. 26 U.S.C.
15 § 6334(e)(1)(A) ("A principal residence shall not be exempt from levy
16 if a judge or magistrate of a district court of the United States
17 approves (in writing) the levy of such residence."). Consequently,
18 the second exception does not apply.

19 The Johnsons seem to acknowledge neither exception to the
20 doctrine of judicial immunity applies. Nevertheless, they urge the
21 Court to withhold immunity from Magistrate Judge Creatura. Granting
22 him immunity, they argue, would be unjust because it would shield him
23 from accountability for violating their constitutional rights.
24 Although the Johnsons' argument may be heartfelt, it is misguided.
25 Suing a judge for money damages is not the proper mechanism for
26 challenging the correctness of his rulings. Rather, the proper
mechanism is an appeal. Congress has long recognized federal judges
occasionally make mistakes. As a result, "Congress has provided

1 carefully structured procedures for taking appeals, including
2 interlocutory appeals, and for petitioning for extraordinary writs in
3 Title 28 of the United States Code. Through these procedures, a
4 litigant . . . receives full federal court review of allegations of
5 deprivations of federal constitutional rights by federal judicial
6 officers acting under color of federal law." *Mullis*, 828 F.2d at
7 1394. It appears the Johnsons could have appealed, which would have
8 given them an opportunity to challenge the correctness of Magistrate
9 Judge Creatura's rulings. *See, e.g., United States v. Pragasam*, No.
10 06-56691, 2007 WL 1731107 (9th Cir. June 15, 2007). However, there is
11 no indication the Johnsons appealed. Having waived appellate review
12 of Magistrate Judge Creatura's rulings, the Johnsons cannot reasonably
13 complain that granting him immunity will unjustly deprive them of an
14 opportunity to seek judicial redress for their grievances.²
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16
17 ²Other litigants may be in a better position to claim
18 injustice. As the Supreme Court has recognized, the doctrine of
19 judicial immunity will, on occasion, deny a litigant any remedy
20 for allegedly unconstitutional conduct on the part of a judge.
21 *See, e.g., Mireles*, 502 U.S. 10, 112 S.Ct. 286. The fact the
22 doctrine of judicial immunity produces a harsh outcome in certain
23 cases does not mean the doctrine is unjust. In assessing the
24 doctrine, at least two interests must be balanced. On the one
25 hand, it is important to provide redress for constitutional
26 violations. On the other hand, it is important to maintain an
independent judiciary. The Supreme Court has weighed the
competing interests and concluded justice is best served by
granting immunity to judges subject to the two exceptions that
were discussed above. *Id.* at 9, 112 S.Ct. 286.

1 One question remains. Besides money damages, the Johnsons seek
2 an order restoring their former residence to them free of
3 encumbrances, and they seek a permanent injunction barring the IRS
4 from seeking to seize their residence by means of an administrative
5 levy. Are these types of relief also precluded by the doctrine of
6 judicial immunity? The Ninth Circuit answered this question in *Mullis*
7 *v. United States Bankruptcy Court, supra*:

8 [W]hen a person who is alleged to have caused a deprivation
9 of constitutional rights while acting under color of federal
10 law can successfully assert judicial or quasi-judicial
11 immunity from damages, that immunity also will bar
12 declaratory and injunctive relief. The judicial or quasi-
13 judicial immunity available to federal officers is not
14 limited to immunity from damages, but extends to actions for
15 declaratory, injunctive and other equitable relief.
16 828 F.2d at 1394. In view of this holding, the Johnsons remaining
17 requests for relief are also barred.

18 **SUMMARY**

19 The Johnsons have filed suit against Magistrate Judge Creatura
20 under 42 U.S.C. § 1983. They allege he violated the Constitution
21 during November of 2009 by authorizing the IRS to collect allegedly
22 unpaid federal income tax by means of an administrative levy upon
23 their residence. The Johnsons are not entitled to relief under § 1983
24 because Magistrate Judge Creatura did not act under color of state
25 law; he acted under color of federal law. If the Johnsons have a
26 remedy, it is under *Bivens v. Six Unknown Named Agents of Federal*
Bureau of Narcotics, supra. However, it would be futile to offer them

1 an opportunity to file an amended complaint seeking relief under
2 *Bivens* because any type of relief they could request would be barred
3 by the doctrine of judicial immunity. Since there is no claim the
4 Johnsons may assert against Magistrate Judge Creatura for which relief
5 may be granted, their complaint must be dismissed with prejudice
6 pursuant to Rule 12(b)(6).

7 **IT IS HEREBY ORDERED:**

8 1. The defendant's motion to dismiss (**Ct. Rec. 5**) is **granted**.
9 The plaintiffs' complaint is dismissed with prejudice.

10 2. The Clerk of the Court shall enter judgment in accordance with
11 this order.

12 **IT IS SO ORDERED.** The Clerk of the Court is hereby directed to
13 enter this order, furnish copies to the plaintiffs and to counsel for
14 the defendant, and close the case.

15 **DATED** this 7th day of April, 2011.

16
17 s/Fred Van Sickle
18 Fred Van Sickle
19 Senior United States District Judge
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